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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

Nos. 321, 322

JOHN H. CHATZ, TRUSTEE IN BANKRUPTCY OF HOWARD HABERMAN, DOING BUSINESS AS THE CLUB STORE AND MORTON CLOTHIERS, BANKRUPT,

Petitioner,

vs.

ARMOUR PLANT EMPLOYEES CREDIT UNION, A CORPORATION,

Respondent.

JOHN H. CHATZ, TRUSTEE IN BANKRUPTCY OF HOWARD HABERMAN, DOING BUSINESS AS THE CLUB STORE AND MORTON CLOTHIERS, BANKRUPT,

Petitioner,

vs.

ANDREW A. TODD, CHELSEY H. TALLEY AND ARMOUR PLANT EMPLOYEES SERVICE BUREAU, A CORPORATION,

Respondents.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

The first two of the reasons advanced by petitioner for the grant of certiorari are virtually conceded upon analysis of respondents' brief.

It is not contended that the trial court's findings do not support its judgment. Hence, unless Rule 52(a) (of the rules for district courts) impliedly repealed the statutes (directed to circuit courts of appeals) prohibiting reversals for errors in fact, giving the trial court's findings the effect of a jury's verdict, and limiting the review to whether the findings support the judgment, the court below clearly exceeded its authority. Respondents recognize the conflict between the rule and the statutes on appeal, but resolve it summarily in favor of an implied repeal of the latter. The question is too important to be disposed of in such manner.

The conflict between the circuit courts of appeals since the adoption of Rule 52(a) on the extent of their review (independently of the statutes governing appeals substituted for writs of error) is most evident in respondents' quotations, but the vital distinction between limiting the review to a determination only of the existence of substantial evidence to support the findings as against a determination also of the clear weight of the evidence were lost sight of. The cleavage among the circuits on this important aspect of federal appellate practice is indisputably manifest in the closing sentence of the opinion in *Federal Deposit Insurance Corp.* v. *Deatton,* (C. C. A., 10th circuit) 105 F. (2d) 677, 680:

> "All such findings on the part of the trial court being supported by substantial evidence has the force and effect as if made through the verdict of a jury under proper instructions on the issues and may not be disturbed here on appeal."

We briefly refute respondents' principal points and assertions of our inaccuracies, with a view to pointing out that the questions created by the manner of the review by the court below are real, not feigned, and warrant this court's review.

1. That Rule 52(a) was adopted by this court, has the force of law, and could not take effect until reported to Congress by the attorney general at the beginning of a regular session and until after its close, do not alter the situation. Whether Congress acted as it did, or itself had set up rules *for district courts* verbatim in a statute, Rule 52(a) would nonetheless require construction, and, however interpreted, would pose the questions now submitted as reasons for the grant of certiorari in the case at bar.

The cited note of the Advisory Committee on Rules (House document No. 588, 75th Congress, 3rd Session) was prefaced with an introductory statement (p. vii), the last paragraph of which significantly states:

> "Statements in the notes about the present state of the law, or the extent to which existing statutes have been superseded by or incorporated in the rules, should be taken only as suggestions and guides to source materials. Such statements, and any other statements in the notes as to the purpose or effect of the rules, can have no greater force than the reasons which may be adduced to support them. The notes are not part of the rules, and the Supreme Court has not approved or otherwise assumed responsibility for them. They have no official sanction, and can have no controlling weight with the courts, when applying the rules in litigated cases."

Obviously, it is not contended that the question has ever been decided; and we note that this Court has before invalidated rules of court interfering with litigants' rights under statutes; *Davidson Marble Co.* v. *Gibson*, 213 U. S. 10, *Washington-Southern Navigation Co.* v. *Baltimore & Philadelphia Steamboat Co.*, 263 U. S. 621, 635-6.

2. Petitioner's action was one for a money judgment and in substance one which prior to the rules would have been an action at law. It is no argument, as respondents urge,

that prior to the rules petitioner would have been obliged to bring several actions at law and not a joint action for lack of a joint contractual obligation. See: *Mutual Life Insurance Co.* v. *Hillmon*, 145 U. S. 285, and *Baltimore & O. S. W. R. Co.* v. *U. S.*, 220 U. S. 94, 106.

The reference to the part of the judgment cancelling the past due notes (R. 621) is to surplusage, and not equitable relief. Judgment was given to *respondents* upon *their* counterclaim on *these* notes, the amount was credited against petitioner's claim, and the notes therefore were adjudged paid and satisfied. The direction to deliver them up for cancellation was surplusage, as the district court gave respondents their full relief at law by set-off of their pleaded counterclaim.

That the pleadings and practice are in conformity with existing rules does not detract from substance. The record is replete with instances where respondents attributed to petitioner's suit the character of an action at law. The complaint as amended prays only for a money judgment (R. 1580-1). Respondents, objecting to the amendment, stated that it changed the action to one at law (R. 1592). Respondents' motion for rehearing asserts that the complaint as amended had become "in its nature a law action" (R. 1637). Point III of their motion to dismiss the complaint prior to amendment stated it "is not a subject of equity" (R. 19). Their reply points out that petitioner's counsel did not dispute their point that the complaint was not a subject of equity (R. 30). The court at the trial regarded the parties' audit reports of what was due and the objections thereto as pleadings (R. 975). While, at the conclusion of petitioner's evidence, respondents moved for dismissal (R. 1563-5), the court's order denied "their motion for a finding in their favor" (R. 1566). The court's findings of fact commences that the case came on for trial and hear-

ing before the court "sitting without a jury" (R. 1598). The judgment recites that the case "came on to be heard for trial without a jury" (R. 1620). The relief granted to petitioner was only a money judgment (R. 1621). The whole course of the action was in substance one at law. See: *Buzard* v. *Houston*, 119 U. S. 347; *U. S.* v. *Bitter Root Co.*, 200 U. S. 451, 471-3; *Ex parte Peterson*, 253 U. S. 300; and *Enelow* v. *New York Life Insurance Co.*, 293 U. S. 379.

As pointed out in petitioner's brief the circuit court of appeals was limited by statutes expressly directed to *its* jurisdiction and authority to review for errors of law alone, was forbidden to reverse for errors of fact, and could only determine whether the findings supported the judgment. Independently of these statutes, it is the view in the Third, Fifth, Ninth and Tenth Circuits, in their interpretation and application of Rule 52(a), that they may ascertain whether the findings are supported by substantial evidence, but they may not, as did the court below and the cases in the eighth circuit, go farther and determine where the weight of the evidence in their judgment lay. The dissenting judge below clearly recognized the distinction and was for affirmance because the judgment and findings of the trial court were in his view supported by substantial evidence.

3. Respondents say the court below found no substantial evidence in support of *any* findings of duress.

The majority mentioned duress four times. *Three* times in its opinion the majority pointed out that the duress which it considered *was with respect only* to the "agreement" of August 16, 1935 (R. 1947, 1948). Its conclusion, the fourth and last mention of duress, was thereby limited. It did not review or purport to review other findings or other evidence of duress in the record.

What is called an "agreement", as quoted in the opinion, is a written authorization to divert and pay to the Credit Union (to whom the bankrupt was not obligated) collections made from the bankrupt's own accounts. It was no more, and had no greater efficacy than the bankrupt's similar oral statements to respondents on other compulsory occasions clearly established in the record. This document in and of itself was no agreement, deed or assignment. There is not one word in it about what it was given for, what respondents were to do in exchange for it, or what effect was to be given the payments made to the Credit Union pursuant to its purported authority.

For this "agreement" (authorization) there was no consideration, with all due respect to the majority of the court below. We gave citations to the record. Respondents did not point to any others or assert that ours were not correct. Todd doesn't remember the circumstances other than that the document was brought to him by the bankrupt (R. 581-2). Talley's only testimony about it (R. 750-1) contains not one word that it was given for anything,—certainly not for any of the matters mentioned by the majority below. The bankrupt said he received no consideration (R. 436).

Loans could not possibly have been a consideration for this "agreement" (authorization), as we demonstrated that none were made to the bankrupt after June, 1935, until January, 1936. The finding (No. 27, R. 1605) which respondents cite of loans "as hereinafter set forth" is not inconsistent, as the subsequent reference, finding 32 (R. 1608), was that the loans were made "from time to time between March, 1935, and October, 1938." The note signed on August 17, 1935, as shown by respondents' own record reference (R. 290) was on that day signed *in blank with no amount* stated in it and was *not* for a loan.

Its amount ($8,600.88), inserted at a later time, was only a note balance; and the conversation at that time was only for the payment of usurious interest at $43.15 per *week* (R. 286). It is obvious that only usury was the motive and consideration for that note,—nothing else.

The dissenting judge felt that there was substantial supporting evidence for findings of duress (not limited to the authorization singled out by the majority); and it is unseemly that the majority draw only an inference that "bankrupt paid liberally" (R. 1944) in preference to the duress found by the trial court. We have urged not only that the court below may not reverse for error in fact, but that Rule 52(a), independently of the statutes on appeal, does not permit a reviewing court to ignore other findings which would support the judgment and to disregard other substantial evidence in the record and the reasonable inferences therefrom to support such findings and the judgment.

4. It has not been, and cannot be, denied that the majority of the court below failed to cite any Illinois cases on the subject of duress, and indeed, frankly stated that its reasons need not be given or discussed.

There can also be no other conclusion but that the dissenting judge upheld the view that duress within the meaning of the Illinois law was substantially proved. Had he agreed with the majority on the question of law, he could not have been of the opinion to accept the trial court's findings as supported by substantial evidence and affirm (except for interest), as his opinion clearly states.

It is strange indeed that with the wealth of cases cited by respondents in their brief, not one is referred to by the majority of the court below. These cases hold that payments of money voluntarily made under mistake of law or in satisfaction of disputed claims which require no hasty action,

and for the litigation of which adequate legal remedies, if desired to be pursued, are available without risk of real injury, and which, *therefore,* do not affect the will, are not made under duress. Those cases, however, which do discuss moral and business duress recognize that such duress is actionable in Illinois.

No one prior to the decision of the majority below would have believed that there was no moral and business duress, where, as here, the respondents' position over the bankrupt was continuously one of overwhelming dominance, where the bankrupt's installment business depended upon weekly collections in small amounts from customers who were largely employees of Armour and Company, where resort to their wages was had through their orders for weekly wage deductions directed, delivered to and accepted by respondents,—and none others,—where respondents' sudden refusal to collect wages by the orders would invalidate them, where the bankrupt's only recourse was for himself to collect on wage assignments, and where the respondents threatened that they would interfere with such collection if attempted and would see that checks due employees would not be withheld so that bankrupt's collections would be so far delayed that his creditors would then be after him and bankruptcy would inevitably follow, unless he submitted to their diversion of the collections from his own accounts to the Credit Union to whom he was not at all obligated or indebted. The duress was a continuing one and the fear of being forced into bankruptcy so great that the bankrupt's efforts were limited to futile objection. Suit would have precipitated what he was striving to avoid,—an unwarranted and threatened interference with his collections upon which the continued existence of his business depended and which in but a short time (less than what suit would entail) would have spelled

his ruin. There is no analogy to cited cases to set aside deeds, as here only money (for which bankrupt received nothing in return) was sought to be recovered from those who had received it, and in an amount in excess of the claim against the bankrupt. Suit was timely at any time within the period of the Statute of Limitations the plea of which respondents unsuccessfully interposed.

However, in the light of the opinion of the majority of the court below, the Illinois doctrine of moral and business duress is cast in doubt.

Counsel had concluded their argument with the assertion of the amount of the bankrupt's indebtedness, omitting to state that it was the indebtedness owing in January, 1939, and not the amount of the indebtedness allowed in the bankruptcy court. Whether the funds recovered will be more than sufficient to pay the indebtedness of creditors, together with interest in the intervening period, does not detract from petitioner's duty as trustee in bankruptcy to effect collection in full of his cause of action, and certainly does not authorize deviation from proper limits of review.

Conclusion.

It is respectfully submitted that the reasons urged in the petition warrant the grant of writs of certiorari, that duress was proved under the law of Illinois, if correctly interpreted, that the court below despite Rule 52(a) was not authorized by the acts of Congress governing appeals in the circuit courts of appeals to review or reverse for alleged errors in fact, that Rule 52(a) is in need of definition, and that the lack of unanimity among the judges in the court below of the scope of the rule on review is but illustrative of the larger conflict between the circuits which this court, for the sake of uniform and correct appellate

practice in all the circuit courts of appeals, should resolve.

Respectfully submitted,

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